

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Federal Communications Commission Seeks)	GN Docket No. 13-86
Comment on Adopting Egregious Cases Policy)	

COMMENTS OF NBCUNIVERSAL MEDIA, LLC

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NBCUniversal Media, LLC (“NBCUniversal”), by its attorneys, respectfully submits these comments in response to the captioned public notice seeking comment on whether the “Commission should make changes to its current broadcast indecency policies or maintain them as they are.”¹ The indisputable answer to this question is that the agency’s current indecency policies and procedures violate broadcasters’ First Amendment rights and cannot be maintained.

NBCUniversal strongly supports enabling families to make informed, independent choices about the programming their children view, and it takes seriously its long-standing commitment to be a responsible member of the broadcasting community. Along with other industry leaders, NBCUniversal has taken substantial steps in the past 20 years to improve the flow of information to parents about the content of particular programs and to make new technology and other tools available to them to control the content available in their homes. Especially in light of these and other significant changes in the marketplace, the Commission should take this opportunity to confront candidly and openly whether and to what extent it may

¹ See *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints)*; *Seeks Comments on Adopting Egregious Cases Policy*, GN Docket No. 13-86, DA 13-581 (EB/OGC rel. Apr. 1, 2013), 78 Fed. Reg. 23563 (Apr. 19, 2013).

continue policing broadcast indecency at all. If it concludes that it can, the Commission must at minimum revise its outdated policy to address its most serious constitutional defects.

I. SUMMARY

The Commission's current indecency policy suffers from two fatal constitutional flaws. First, it imposes nakedly content-based restrictions on broadcasting that would not satisfy strict scrutiny review and that would unquestionably be unconstitutional as to any other medium. The Commission's only justifications for these incongruous intrusions are two long-outmoded observations made 35 years ago in *FCC v. Pacifica Foundation*, and which describe a now-unrecognizable media marketplace: that broadcasting then (1) had a "uniquely pervasive presence in the lives of all Americans"; and (2) was "uniquely accessible to children."²

If *Pacifica*'s premises were ever accurate, they assuredly are not true today. Broadcast TV is not a uniquely pervasive presence in the lives of 21st Century Americans; in today's world of cable and satellite television and the Internet, it is just one among many methods by which viewers access the programming they prefer. Nor is broadcast television uniquely accessible to children compared to other media, especially in light of new technology and industry initiatives that empower parents to control what their children watch – the result of significant and successful investment by the broadcast and content communities.

The Commission cannot ignore these fundamental changes, which have eroded *Pacifica*'s premises to the point of obsolescence. And unless it can establish any other legitimate basis for singling out broadcast for second-class constitutional protection, the Commission cannot continue to regulate broadcast indecency without demonstrating that its policy is the least restrictive means to achieve a compelling governmental interest.

² *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978) ("*Pacifica*").

Second, even if the Commission could lawfully impose any indecency standard on broadcasters, its existing standard – both on its face and as the Commission has interpreted and applied it – is unconstitutionally vague. The standard the Commission has articulated is indistinguishable from the one the Supreme Court rejected on vagueness grounds in *Reno v. ACLU*.³ Far from curing that defect by clarifying the scope of its standard, the Commission’s capricious applications of it make it even more opaque – inventing arbitrary and unprincipled distinctions, which the Commission has applied inconsistently and unpredictably. The Commission’s enforcement procedures have only made matters worse, conferring a heckler’s veto on a vocal minority of viewers (or sometimes *non*-viewers) and exposing broadcasters to prolonged uncertainty regarding what the Commission may deem indecent tomorrow, which may bear little or no resemblance to what it condemns as indecent today.

The Commission must seriously grapple with these problems and must reexamine both the basis of its claimed authority in this area and what enforcement regime, if any, would be constitutionally sustainable. To be sure, it is highly doubtful that the Commission can craft any indecency enforcement regime in a manner that adequately respects the First Amendment. But if the Commission wishes even to consider maintaining such a regime, it must confront these issues and carry its burden of showing that whatever new policy it adopts comports with the Constitution. Both prudence and the Administrative Procedure Act require that such reexamination take place in the context of a notice and comment rulemaking in which all interested parties can meaningfully participate – not through additional, erratic *ad hoc* adjudications that have exacerbated the existing problems.

³ *Reno v. ACLU*, 521 U.S. 844 (1997) (“*Reno*”).

II. THE COMMISSION'S EXISTING INDECENCY REGIME IS UNCONSTITUTIONAL

A. *Pacifica* No Longer Provides a Valid Basis for a Broadcast-Specific Indecency Regime

Content-based restrictions on speech are presumptively unconstitutional, including restrictions on indecent material that comes into the home.⁴ These principles generally apply regardless of the specific medium of communication.⁵ As the Supreme Court has made clear, “whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”⁶ And the “most basic of those principles” is that “[a]s a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁷ A regime that overtly dictates what speakers may not say or depict, based on an agency’s subjective determination that it is indecent, plainly falls within this prohibition. The Commission’s broadcast indecency policy, of course, does exactly that.

The only basis the Commission has proffered for its claimed authority to impose that regime is the Supreme Court’s decades-old decision in *Pacifica*. But that ruling cannot support the Commission’s intrusion into broadcasters’ protected editorial discretion. *Pacifica*’s narrow, fact-bound holding sustained the Commission’s determination that George Carlin’s “seven dirty

⁴ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 814 (2000) (“*Playboy*”); *Reno*, 521 U.S. at 885; *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (“*Sable*”).

⁵ *Playboy*, 529 U.S. 803 (cable television); *Reno*, 521 U.S. 844 (internet); *Sable*, 492 U.S. 115 (telephone); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (mails); *Miami Herald Publ’g Co., Div. of Knight Newspaper, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (print); *United States v. 12,200-ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973) (film).

⁶ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (quotation omitted).

⁷ *Id.* (quotation omitted) (omission in original).

words” monologue was indecent on the ground that it was tantamount to “verbal shock treatment” as opposed to the “isolated use of a potentially offensive word.”⁸ The Court took pains to emphasize the “narrowness of [its] holding,” which “ha[d] not decided that an occasional expletive . . . would justify any sanction.”⁹ The majority made clear, moreover, that the words used in Carlin’s monologue were “*not* entirely outside the protection of the First Amendment” and that the “monologue would be protected in other contexts.”¹⁰ The Court concluded that the Commission could declare the monologue’s broadcast unlawful in the specific circumstances of the case for two reasons: (1) broadcasting was “a uniquely pervasive presence in the lives of all Americans” that “confronts the citizen . . . in the privacy of the home”; and (2) broadcasting was “uniquely accessible to children” compared to other types of content, such as adult books in bookstores, which can “be withheld from the young without restricting the expression at its source.”¹¹ As the Court later emphasized, *Pacifica*’s “narrow” holding depended on these supposedly “‘unique’ attributes of broadcasting.”¹²

The realities of today’s marketplace, however, demonstrate conclusively that TV broadcasting is neither a uniquely persuasive presence in the lives of Americans nor uniquely accessible to children. The Supreme Court itself has recognized since *Pacifica* that those “attributes” are no longer “unique” to broadcast. “Cable television broadcasting,” it has explained, “is as ‘accessible to children’ as over-the-air broadcasting, if not more so,” and if anything it is now “[c]able television systems” that “‘have established a uniquely pervasive

⁸ See *Pacifica*, 438 U.S. at 760–61, 777 (Powell, J., concurring).

⁹ *Id.* 750.

¹⁰ *Id.* at 746 (emphasis added).

¹¹ *Id.* at 748–49.

¹² *Sable*, 492 U.S. at 127.

presence in the lives of all Americans.’”¹³ And both individual Justices and lower courts have questioned the continuing validity of *Pacifica* as its “twin pillars of pervasiveness and accessibility to children” have eroded.¹⁴ Justice Thomas has noted that “traditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were,” and that “technology has provided innovative solutions to assist adults in screening their children from unsuitable programming – even when that programming appears on broadcast channels.”¹⁵ Justice Ginsburg has observed that “[t]ime, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration,”¹⁶ and that the Commission may wish to “reconsider its indecency policy in light of technological advances and the Commission’s uncertain course since this Court’s ruling in [*Pacifica*].”¹⁷

Empirical data and the Commission’s own analyses confirm that these judicial pronouncements are correct. TV broadcasting is in fact neither a uniquely persuasive presence in the lives of Americans nor uniquely accessible to children. These changed circumstances obliterate the factual bases for according less protection to broadcasters’ speech than that of other

¹³ *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 744-45 (1996) (quoting *Pacifica*, 438 U.S. at 748).

¹⁴ *Fox TV Stations, Inc. v. FCC*, 613 F.3d 317, 326-327 (2d Cir. 2010) (“*Fox TV Stations III*”), *vacated and remanded on other grounds*, *FCC v. Fox TV Stations*, 132 S.Ct. 2307 (2012) (“*Fox TV Stations IV*”). The Second Circuit reached a similar conclusion earlier: “[W]e would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children.” *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (dicta) (“*Fox TV Stations I*”), *reversed and remanded on other grounds*, *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009) (“*Fox TV Stations II*”).

¹⁵ *Fox TV Stations II*, 556 U.S. at 533, 534 n.* (2009) (Thomas, J., concurring).

¹⁶ *Fox TV Stations IV*, 132 S. Ct. at 2321 (Ginsburg, J., concurring).

¹⁷ *FCC v. CBS Corp.*, 132 S. Ct. 2677 (2012) (Ginsburg, J. concurring in denial of petition for writ of certiorari).

media. If the Commission can pursue any broadcast indecency enforcement regime going forward, it thus cannot be predicated on *Pacifica*.

1. Television Broadcasting Is Not “Uniquely” Pervasive

In the age of cable and satellite television and the Internet, broadcasting is now just one of many methods of delivering content to Americans in their homes. As the Commission has documented, multichannel video programming distributor (“MVPD”) services have grown to near ubiquitous levels, and online video – available both on wired and wireless devices – is booming. Household reliance on over-the-air TV broadcasting, unsurprisingly, has drastically decreased.¹⁸ The advent of other new delivery and storage technologies also has fundamentally changed viewing habits and further undermined reliance on broadcast as the primary means of accessing video programming.

Increased Prevalence of MVPDs. The Commission’s most recent report on video competition notes that approximately **90 percent** of all U.S. television households receive broadcast signals through an array of MVPDs (including cable, satellite, and telco platforms).¹⁹ Broadcast’s share, in contrast, has declined dramatically. Only 9.6 percent of television households relied solely on over-the-air broadcast signals as the source for their television programming.²⁰ In approximately the same period, the Census Bureau reported that only about

¹⁸ Commission analysts highlighted the implications of the explosive growth of alternative video outlets some time ago: “[W]hat is pervasive today is hundreds of channels and billions of web pages.” John W. Berresford, FCC, *Media Bureau Staff Research Paper: The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, at 29 (Mar. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf.

¹⁹ See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 27 FCC Rcd 8610, 8694 (2012) (“2012 Video Competition Report”).

²⁰ 2012 Video Competition Report, 27 FCC Rcd at 8705-06.

one-third of U.S. households included children under the age of 18.²¹ Extrapolating from these numbers suggests that only about **3.2 percent** of the nation's 114.7 million TV households²² rely solely on broadcast television and have children under the age of 18 in the household.

Broadcast's total day share of viewing, moreover, is declining. The share of broadcast network affiliates was just 28 percent in the 2010-2011 television season – compared to the 53 percent viewing share held by ad-supported cable programming networks.²³ Those trends among the general television audience are evident among younger viewers as well: Young people between 12 and 17 watch more than three times as much cable programming (14 hours per week) as they do broadcast TV programming (4.4 hours per week).²⁴

²¹ See U.S. Census Bureau, *American Fact Finder, Profile of General Population and Housing Characteristics: 2010*, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_AIAN_AIANDP1&prodType=table (reporting 33.4 percent of U.S. households include individuals under 18 years) (last visited June 17, 2013).

²² Nielsen, *Nielsen Estimates Number of U.S. Television Homes to be 114.7 Million*, (May 3, 2011), <http://www.nielsen.com/us/en/newswire/2011/nielsen-estimates-number-of-u-s-television-homes-to-be-114-7-million.html>.

²³ *2012 Video Competition Report*, 27 FCC Rcd at 8706-07. Data focusing on prime-time viewing are much the same: The total broadcast share of the audience was 33 percent, while ad-supported cable networks accounted collectively for 51 percent. *Id.*

²⁴ Nielsen, *How Teens Use Media*, at 3 (June 2009), available at <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2009-Reports/How-Teens-Use-Media.pdf>. Similarly, children under the age of 12, like their elders, are just as likely to seek out cable programming channels tailored specifically to serve the interests of a particular niche audience. Programming options targeted to – and suitable for – younger children include Nickelodeon, Nick Jr, the Disney Channel, and Sprout, among others. Recent data suggest that child viewers are increasingly shifting away from broadcast fare. See Nielsen, *Television Audience 2010 & 2011*, at 26 (2011), available at <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/2010-2011-nielsen-television-audience-report.pdf> (weekend daytime hours that broadcast networks devoted to children fell from 44 percent in 2006-2007 to 30 percent in 2010-2011). At essentially the same time, the audience for child-centric cable programming has been growing. See Nielsen, *Nielsen Universe Estimates – March 2012* (2012) (showing ratings growth in children's cable programming networks from 2006 to 2012).

Online Video Programing. The former pervasiveness of broadcasting has been undercut even further by online media outlets. The Commission recently concluded that broadband Internet access service is now available to more than 94 percent of American households.²⁵ And it has found that approximately 86 percent of Internet users viewed and/or downloaded videos online, with major Internet portals increasingly licensing both pre-existing and original content from traditional video providers.²⁶ Other sources confirm this very high usage of online video among consumers with access to high-speed services.²⁷ Direct access to streaming content has

²⁵ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 27 FCC Rcd 10342, 10374 (2012). Other government data indicate that more than 70 percent of these homes are connected to the Internet and virtually all of them make use of high-speed services. U.S. Census Bureau, *Computer and Internet Use in the United States: 2010*, Table 1A (July 2012), available at <http://www.census.gov/hhes/computer/> (follow “XLS” hyperlink for Table 1A) (27.0 percent of households have Internet access at home only and 44.0 percent have access both at home and outside of home); see also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 550 (2009) (“2009 Video Competition Report”). Broadband also is making significant inroads in rural areas, which means that families in isolated locations have been gaining more video options as well. See *2012 Video Competition Report*, 27 FCC Rcd at 8623 (number of rural telephone companies offering high-speed services increased from 61 in 2007 to 159 in 2010).

²⁶ See *2009 Video Competition Report*, 24 FCC Rcd at 613-14. As demonstrated by Netflix’s release of “House of Cards” and new episodes of “Arrested Development,” the availability of high quality web-only content is increasing rapidly. See *2012 Video Competition Report*, 27 FCC Rcd at 8728.

²⁷ A May 2011 Pew survey indicates that 71 percent of online adults use online video sites. *2012 Video Competition Report*, 27 FCC Rcd at 8748 (citing Kathleen Moore, 71% of Online Adults Now Use Video Sharing Sites, Pew Internet, July 26, 2011, <http://pewinternet.org/Reports/2011/video-sharing-sites.aspx>). Alternatively, comScore reports that 86 percent of U.S. Internet users view online video. *Id.* at 8748 n.1008 (citing comScore Inc., comScore Releases July 2011 U.S. Online Video Rankings (press release), Aug. 22, 2011). Research firm eMarketer estimates that as of April 2010, 66.7 percent of U.S. Internet users, representing 147.5 million people, watch online video each month. *Id.* at 8748 (citing eMarketer, Online Video Goes Mainstream, Apr. 28, 2010, <http://www.emarketer.com/Article.aspx?R=1007664>). And nearly 50 percent of U.S. adult online video viewers watched full-length television shows on the Internet at least monthly,

skyrocketed as well. Recent data indicate that more than 55 percent of American households now stream TV and movies online.²⁸ That increase reflects the entry of many new players to the online-video market. Netflix may have blazed the trail for video delivered directly to the home,²⁹ but many online service providers such as YouTube, Facebook, Yahoo, Apple, Amazon, and others are actively courting residential consumers who want to control both what they see and when they see it.³⁰ As the Commission, along with industry, pushes to increase broadband uptake well beyond a threshold level of “pervasiveness,” the online video usage numbers are likely to spike even higher.³¹

Mobile Video. Mobile video, while still in its early stages,³² also is becoming increasingly popular – particularly with younger viewers. In its report to Congress under the

according to another eMarketer report. *Id.* at 8749 (citing eMarketer, Online Video Viewing Passes 50% of Total US Population, Dec. 8, 2011, <http://www.public.site1.mirror2.phi.emarketer.com/Article.aspx?R=1008724>).

²⁸ Mike Snider, *Love of Streaming Video Lifts Netflix: In 25% of Homes*, USA Today (Jan. 30, 2013 6:02 PM), <http://www.usatoday.com/story/tech/personal/2013/01/30/streaming-video-netflix-rebound/1876643/> (remaining 30 percent of total streaming households use Hulu, YouTube, Amazon Prime, and other services for long- and short-form video).

²⁹ By the end of 2010, a majority of Netflix subscribers viewed more of Netflix’s television shows and movies via streaming to computers, mobile devices, and televisions connected to a Netflix-enabled device, than from Netflix’s DVD rental service. *2012 Video Competition Report*, 27 FCC Rcd at 8725. Moreover, as of March 31, 2013, Netflix had more than 36 million subscribers, substantially more than Comcast’s total subscriber base. *See By The Numbers: Netflix Subscribers*, Yahoo! News, May 24, 2013, <http://news.yahoo.com/numbers-netflix-subscribers-205626746.html>.

³⁰ *2012 Video Competition Report*, 27 FCC Rcd at 8722, 8724-26.

³¹ The FCC already has recognized that “[t]he number of suppliers of online video and audio is almost limitless.” *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd 11413, 11468 (2009) (“CSVA Report”).

³² According to Nielsen, 12.85 percent of Americans watch mobile video. *See Nielsen, The Cross-Platform Report, Quarter 3, 2012 - US*, at 6 (2012), available at <http://www.nielsen.com/content/dam/corporate/us/en/reports->

Child Safe Viewing Act, the Commission stated that “77 percent of teens in the U.S. have their own mobile phone[s],”³³ which increasingly are used to access video content from the Internet and other sources. More recently, the Commission has noted an increase of 36.9 percent in the number of mobile video users between the third quarter of 2010 and the third quarter of 2011.³⁴ Other data from the same general period again confirm the Commission’s finding: On average, mobile subscribers ages 12-17 watched 7 hours and 13 minutes of mobile video a month in the fourth quarter of 2010, compared to 4 hours and 20 minutes for the general population.³⁵ The breathtaking speed of growth in mobile video suggests that it also will become functionally “pervasive” sooner rather than later.

New Delivery and Storage Technologies. In addition, the emergence of video recording devices such as VCRs, DVRs and, more recently, cloud-based video storage services, along with DVDs and their technological successors, downloadable videos, have transformed the viewing habits of Americans – particularly children. The Commission has reported that nearly 80 percent of U.S. households owned VCRs as of 2007, and by 2012 more than 40 percent of television households had moved to DVRs.³⁶ These technologies offer parents the ability affirmatively to select programs they deem appropriate for their children.

downloads/2013%20Reports/Nielsen-Cross-Platform-Report-Q3-2012.pdf.

³³ *CSVA Report*, 24 FCC Rcd at 11414 n.5. Consistent with this trend, mobile service providers now offer a range of video offerings for cell phones and other mobile devices, including from networks such as CNN, ESPN, MTV, Comedy Central, Discovery, and Fox News. *2009 Video Competition Report*, 24 FCC Rcd at 549, 610-612.

³⁴ *2012 Video Competition Report*, 27 FCC Rcd at 8756 (citing Nielsen State of the Media, The Cross-Platform Report Quarter 3, 2011 – US, at 5).

³⁵ Nielsen, *Kids Today: How the Class of 2011 Engages with Media* (June 8, 2011), <http://www.nielsen.com/us/en/newswire/2011/kids-today-how-the-class-of-2011-engages-with-media.html>.

³⁶ *See 2009 Video Competition Report*, 24 FCC Rcd at 620; *2012 Video Competition*

These changes demonstrate that the world *Pacifica* described – in which viewers depend on over-the-air broadcast for most or all of the video programming they watch – looks nothing like the market today. Today it is consumers, not broadcasters, who decide what they will watch and when.

2. Television Broadcasting Is Not “Uniquely” Accessible to Children

Both the increased prevalence of other media and the evolution of blocking technologies and the associated program ratings system also have undermined *Pacifica*’s assumption that broadcast TV is uniquely accessible to children. Parents today easily can control what broadcast TV their children watch, whether the parents are present or not.

Blocking Technologies. The rise of content-blocking technologies such as the V-Chip – which the Commission itself helped to develop³⁷ and continues to promote³⁸ – enables parents to make broadcast TV much less accessible to children today than it was to earlier generations.

Parents need not even be in the room – or even in the home at all – for the blocking function to

Report, 27 FCC Rcd at 8700.

³⁷ Following congressional directives in the Telecommunications Act of 1996, the Commission mandated that new television receivers include circuitry to block the display of content deemed objectionable by parents and guardians. *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, 13 FCC Rcd 11248 (1998). Only television receivers with screens smaller than 13 inches wide were exempted from the statutory mandate. The agency also engaged with those who devised the content ratings which, in conjunction with the circuitry, allow households to block programming precisely on the basis of substance (e.g., sexual situations, violence, coarse language) and age-appropriateness (e.g., distinguishing children aged two to six from those aged seven or older and other age-based categories). See *Commission Seeks Comment on Revised Industry Proposal for Rating Video Programming*, 12 FCC Rcd 20772 (1997) (calling for comment on new ratings proposal that more specifically identified content). By 1998, the Commission reported favorably to Congress on the ratings design. *Implementation of Section 551 of the Telecommunications Act of 1996: Video Programming Ratings*, 13 FCC Rcd 8232 (1998).

³⁸ FCC, V-Chip: Viewing Television Responsibly, <http://transition.fcc.gov/vchip/> (last visited June 17, 2013).

work. As then-Commissioner Gloria Tristani, who chaired the Commission’s V-Chip Task Force in the late 1990s, explained, the technology provides “essentially a long-range ‘remote control’ that lets parents block programming that they do not want their children to see, even when they can’t be there to turn it off themselves.”³⁹ And because the V-Chip technology requires adults in the household to set the blocking function in advance, the material deemed objectionable never appears in the home, directly addressing (and resolving) the Supreme Court’s concern in *Pacifica* about on-air warnings that might come too late to be effective.⁴⁰

This new technology has given parents an effective tool to control what their children watch. And that tool is now almost universally available. As a result of the digital television transition, since 2009 virtually all over-the-air reception devices provide V-Chip blocking capabilities.⁴¹ Moreover, because about 90 percent of U.S. households receive broadcast signals via an MVPD service, those subscribers also can take advantage of similar blocking technologies adapted for those transmission systems.⁴²

³⁹ News Release, FCC, *FCC V-Chip Task Force Releases Updated Survey on the Encoding of Video Programming* (Jan. 11, 2000), available at http://transition.fcc.gov/Bureaus/Miscellaneous/News_Releases/2000/nrmc0004.html

⁴⁰ *Pacifica*, 438 U.S. at 748-49 (“Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”).

⁴¹ *CSVA Report*, 24 FCC Rcd at 11418. The DTV transition effectively retrofitted older television sets with new technology, including the V-Chip, embedded in the digital converter boxes attached to analog sets.

⁴² *2012 Video Competition Report*, 27 FCC Rcd at 8694. The Commission also has pointed to other options available to help today’s parents manage their children’s access to video content, whether the material originated on broadcast television or not. The agency reported to Congress that the “wide array of parental control technologies for television” includes “VCRs, DVD players, and . . . DVRs . . . that permit parents to accumulate a library of preferred programming for their children to watch.” *CSVA Report*, 24 FCC Rcd at 11418.

The practical benefits of these technological advancements are clear. Video programming transmitted over the air by TV stations today is not more likely to reach minors than video delivered by other means. Because of the V-Chip – a technology that can effectively protect children without “restricting the expression at its source”⁴³ – broadcasting’s accessibility to children today is no greater than that of cable, telephony, or the Internet.⁴⁴

TV Parental Guidelines. Beyond these new technologies that enable parents to prevent certain content from ever reaching their screen, voluntary industry rating systems, including the TV Parental Guidelines, have made it easier than ever for parents who do not wish to filter out such content categorically to make informed, case-by-case decisions regarding the programming their children view.⁴⁵ The TV Parental Guideline rating information is available in numerous forms, most prominently in the upper left hand corner of the television screen at the beginning of

⁴³ *Pacifica*, 438 U.S. at 749 (noting that, unlike broadcasting in 1978, “[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children”).

⁴⁴ Moreover, the proliferation of newer, non-broadcast platforms – such as video games, online video, and mobile video – has opened more portals through which children access original or repurposed video content, making broadcast’s accessibility to children even less unique. The growing popularity of smartphones among children certainly might be characterized as pervasive. See, e.g., Nick Eaton, *Study: More Kids Can Use a Smartphone than Tie Their Shoes*, Seattle Post Intelligencer (Jan. 23, 2011), <http://www.seattlepi.com/lifestyle/article/Study-More-kids-can-use-a-smart-phone-than-tie-974530.php> (study finding that 30 percent of American two- to five-year-olds able to operate a smartphone or tablet computer). Current technology plainly affords youngsters the opportunity throughout the entire day to seek out, and obtain access to, video programming of their own choosing – without the need for proximity to any broadcast receiver. Such interactive communications are akin to the “two-way radio conversation between a cab driver and a dispatcher” that the Supreme Court distinguished from broadcasting in *Pacifica*. See *Pacifica*, 438 U.S. at 750.

⁴⁵ The Commission itself has previously reported on such rating systems to Congress. *CSVA Report*, 24 FCC Rcd at 11487. The FCC also explained to lawmakers that the various parental control tools offered by cable, satellite, and telco MVPDs comprise a significant part of the technologies used by parents to monitor their children’s television viewing. *Id.* at 11438.

each show. NBCUniversal has taken additional steps to ensure parents have access to this information in a clear and conspicuous manner. Specifically, in April 2011, the NBC Network launched improved TV ratings icons that are 50 percent larger and use high contrast background-to-foreground color combinations.⁴⁶ In addition, all ratings icons, including the post-commercial break events, are displayed on screen for 15 seconds to give parents sufficient opportunity to make informed decisions for their households even if they have not activated the V-Chip.⁴⁷ NBCUniversal also partners with groups like Common Sense Media to provide parents with other independent sources to help evaluate the appropriateness of particular programs and other content for children.⁴⁸

Empirical evidence (including data already presented to the Commission) confirms that the TV ratings system is both well understood and widely used by parents today. In April 2012, the TV Parental Guidelines Monitoring Board presented the results of two new surveys to the Commission that indicate that 93 percent of parents, as well as 82 percent of teenagers, are aware of the industry-supported ratings system.⁴⁹ There is comparable awareness of when and where

⁴⁶ NBCUniversal, Annual Report of Compliance with Transaction Conditions, MB Docket No. 10-56, at 23-24 (filed Feb. 28, 2012).

⁴⁷ *Id.* In addition, ensuring that NBC Network programming represents the interests and sensitivities of its broadcast communities and its affiliated stations throughout the country is a key part of NBCUniversal's process for evaluating its programming.

⁴⁸ See Common Sense Media, About NBCUniversal, *available at* <http://www.common sense media.org/about-us/supporters/distribution-supporters/nbc-universal> (last visited June 17, 2013); John Eggerton, *NBCU, Hulu Join Common Sense Media Campaign*, MULTICHANNEL NEWS (Sept. 2, 2010 5:20 PM), <http://www.multichannel.com/content/nbcu-hulu-join-common-sense-media-campaign>.

⁴⁹ See News Release, TV Parental Guidelines Monitoring Board, *New Study Reveals Americans Believe TV Parental Guidelines Are Effective* (Apr. 6, 2012), *available at* http://www.tvguidelines.org/resources/TVGuidelines_Release_4-5-2012.pdf (reporting on separately conducted survey of parents of children aged two through 17 and survey of teens aged 13 to 17). The TV Parental Guidelines Monitoring Board ("Monitoring Board") is the private

the ratings icons appear on the TV screen,⁵⁰ as well as an understanding that the ratings provide guidance based on both the age of the child and the nature of the rated content.⁵¹ A high number of parents report using the ratings system in some fashion, whether or not they also use the blocking technology: 68 percent generally use the current TV ratings to help guide their children's viewing – a number that spikes to 77 percent among parents of children aged six to 10 years old.⁵²

* * * *

Pacifica's characterizations of broadcast's "unique pervasiveness" and "unique accessibility," in short, describe a world that no longer exists. Perfunctory incantations of those phrases thus cannot justify distinguishing broadcast speech from the speech delivered by other popular forms of media today. Unless it can substantiate some other constitutionally sound justification for singling out broadcast for special treatment that comports with today's empirical realities, the Commission cannot adopt any inherently content-based indecency regime that does not satisfy the high standard of strict scrutiny review.⁵³ Its current approach undoubtedly does not qualify, most obviously because it ignores less-restrictive alternatives to direct regulation of broadcast indecency: the V-Chip combined with the program ratings system. Just as with the

entity responsible for overseeing the TV ratings system, which includes ensuring uniformity and consistency in the application of the Guidelines. *Id.*

⁵⁰ *Id.* (88 percent of parents and 81 percent of teens).

⁵¹ *Id.* (88 percent of parents know that the ratings include age indicators, and 82 percent know that the ratings include content descriptors signifying the presence of sexual content, violence, etc.).

⁵² *Id.*

⁵³ *See Fox TV Stations III*, 613 F.3d at 327 ("We can think of no reason why th[e] rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available.").

Internet filtering software at issue in *Ashcroft*, the V-Chip and TV ratings system constitute a sufficient, less-restrictive alternative to protecting children from offensive content.⁵⁴ The fact that the V-Chip and TV Parental Guidelines may not be a complete panacea does not render this technology somehow insufficient from a constitutional perspective.⁵⁵ The “need for parental cooperation does not automatically disqualify a proposed less restrictive alternative.”⁵⁶ Not even the Commission can claim that its direct regulation is 100 percent effective at protecting children from all objectionable content, given that its policy is to initiate enforcement only in response to viewer complaints, i.e., after allegedly offensive material has been broadcast.

B. The Commission’s Existing Standard Is Unconstitutionally Vague

Even if the Commission could show that the First Amendment would permit any content-based indecency regime, its current standard does not pass constitutional muster because it is hopelessly vague both by its terms and as applied. The Commission’s indecency standard is impenetrable on its face and wholly subjective and capricious in application. Broadcasters consequently have no fair notice of what speech is proscribed and are therefore forced to guess what the Commission might deem indecent tomorrow – and face severe penalties if they guess wrong. The inevitable but impermissible result is self-censorship of protected expression.

⁵⁴ *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (“*Ashcroft*”) (striking down the Child Online Protection Act because the government had not demonstrated that its compelling interest in protecting minors could not be well-served by parental installation of Internet filtering software). *See also Playboy*, 529 U.S. at 816, 826-27 (rejecting a statute requiring full scrambling of explicit cable channels when parents could simply ask the cable company to block certain channels from the home).

⁵⁵ *See Playboy*, 529 U.S. at 824 (“It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time.”).

⁵⁶ *Ashcroft*, 542 U.S. at 669.

1. The Indecency Standard on its Face Is Invalid Under *Reno*

“[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”⁵⁷ In other words, statutes and regulations must provide people with fair notice of what is required of them so that they may “steer between lawful and unlawful conduct,”⁵⁸ and protect individuals against the “impermissible risk of discriminatory enforcement.”⁵⁹ A “vague law impermissibly delegates basic policy matters to [government officials] for resolution on an *ad hoc* and subjective basis”⁶⁰ Thus, a law whose “prohibitions are not clearly defined” offends “basic principle[s] of due process” and is “void for vagueness.”⁶¹ Moreover, “stricter standards” of clarity apply to laws that have a “potentially inhibiting effect on speech”⁶² because such a law operates to inhibit the exercise of First Amendment freedoms, which “inevitably lead[s] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”⁶³

The Commission’s indecency definition fails this standard. The Commission defines indecent speech as “material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory

⁵⁷ *Fox TV Stations IV*, 132 S.Ct. at 2317.

⁵⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“*Grayned*”).

⁵⁹ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

⁶⁰ *Grayned*, 408 U.S. at 108-09.

⁶¹ *Id.* at 108.

⁶² *Smith v. California*, 361 U.S. 147, 151 (1959); *see Smith v. Goguen*, 415 U.S. 566, 573 (1974).

⁶³ *Grayned*, 408 U.S. at 109 (internal quotation marks omitted) (first alteration and omission in original).

activities or organs.”⁶⁴ The Supreme Court has already made clear, however, that this standard lacks the clarity and notice that the Constitution requires. In *Reno*, the Supreme Court invalidated the statutory indecency standard in the Communications Decency Act (“CDA”), which was materially identical to the Commission’s standard, i.e., material that “‘in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.’”⁶⁵ The CDA’s indecency standard, the Court held, was plagued by “uncertainty” and full of terms that lacked “any textual embellishment at all” or were barely explained.⁶⁶ The Court accordingly struck down the statute, concluding that its vagueness would have had an “obvious chilling effect on free speech.”⁶⁷ The “general, undefined terms ‘indecent’ and ‘patently offensive’ cover[ed] large amounts of nonpornographic material with serious educational or other value,” and the statute’s vague contours “unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection.”⁶⁸

The Commission’s definition of indecency is plagued by exactly the same “uncertainty” as the CDA. It contains the same terms without “any textual embellishment” or meaningful

⁶⁴ *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue,”* 23 FCC Rcd 1596, 1597 (2008) (“*NYPD Blue*”); *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2667 (2006) (“*Omnibus Order*”). See also *Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8000 (2001) (“*Indecency Policy Statement*”) (indecency earlier defined as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs”).

⁶⁵ *Reno*, 521 U.S. at 859-60 (quoting 47 U.S.C. § 223(d)).

⁶⁶ *Id.* at 871 & n.35.

⁶⁷ *Id.* at 871-72.

⁶⁸ *Id.* at 874.

explanation. The Commission's definition of indecency thus likewise fails to provide the requisite fair notice of what is proscribed, and consequently has the same "obvious chilling effect on free speech." Like the CDA's standard, the Commission's definition is therefore equally unconstitutional.⁶⁹

2. The Commission's Interpretation of its Indecency Standard Has Only Exacerbated the Unconstitutional Vagueness

Far from curing this constitutional defect by supplying the clarity the First and Fifth Amendments require, the Commission's *Indecency Policy Statement* and subsequent case law only make matters worse. The *Indecency Policy Statement* identifies "two fundamental determinations" the Commission makes in evaluating whether broadcast content is indecent, but its description of those analyses is just as opaque as the agency's indecency definition itself:

First, the material alleged to be indecent must fall within the subject matter scope of [the Commission's] indecency definition - that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.⁷⁰

In gauging whether material is patently offensive as measured by contemporary community standards, the Commission explains, it considers three "principal factors": (1) the "explicitness or graphic nature" of the material; (2) whether the material "dwells on or repeats at length"

⁶⁹ That the Court distinguished *Pacifica* in *Reno* is irrelevant. As the Second Circuit correctly recognized, *Reno* distinguished *Pacifica* only "with respect to 'the level of First Amendment scrutiny that should be applied to this medium,' not to its analysis of whether the statute was unconstitutionally vague." *Fox TV Stations III*, 613 F.3d at 329 (quoting *Reno*, 521 U.S. at 870). There is no reason why the "medium" should matter in a vagueness inquiry; a standard either is vague or it is not. Its clarity or lack thereof does not turn on the medium covered. Moreover, for the reasons explained above, any broadcast indecency enforcement regime must be subject to strict scrutiny.

⁷⁰ *Indecency Policy Statement*, 16 FCC Rcd at 8002.

descriptions of sexual or excretory organs or activities; and (3) whether the material “appears to pander or is used to titillate,” or “appears to have been presented for its shock value.”⁷¹

This language does not remotely provide broadcasters any basis on which to predict what speech is prohibited. On their face, the factors the Commission has identified that supposedly elucidate the “patently offensive” inquiry are just as uninformative as the standard itself. It is anyone’s guess what it means for a word, phrase, or image to be “graphic or explicit,” to “appear to pander,” or to be “used to titillate.” And whether speech “appear[s] to be presented for shock value” is, without any greater specificity, entirely in the eye of the beholder. To muddle things further, the Commission does not even require that all of the enumerated factors point toward a finding of indecency for material to be found indecent; one factor alone conceivably could suffice. As the Commission has hinted “[l]ess explicit material and material that relies principally on innuendo to convey a sexual or excretory meaning” may serve as a basis for an indecency finding,⁷² “even relatively fleeting references may be found indecent,”⁷³ and “[t]he absence of a pandering or titillating nature . . . will not necessarily prevent an indecency determination.”⁷⁴ What paltry guidance the Commission’s *ad hoc* multi-factor balancing test provides is erased by the fact that even the factors the Commission has identified are not necessarily exhaustive: The agency has indicated that it may “possibly” rely on unidentified “other factors,” thus reserving the right to contrive equally unhelpful criteria in the future.⁷⁵

⁷¹ *Id.* at 8003 (emphasis omitted).

⁷² *Id.* at 8005.

⁷³ *Id.* at 8009.

⁷⁴ *Id.* at 8014.

⁷⁵ *Id.* at 8003.

The Commission's written guidance, however, is a model of clarity compared to its utterly incoherent pattern of enforcement. The inconsistent results and rationales of its case-by-case indecency determinations deprive any rational observer of the ability to predict, or even to make an educated guess, what the Commission will do next.

Patently Offensive Words. No intelligible principle, and certainly none offered by the Commission, can explain its conclusions, in the very same order, that the use of the word “bullshit” in an episode of “NYPD Blue” *was* patently offensive, but use of “dick” and “dickhead” was *not*.⁷⁶ Nor can the “bullshit” finding be squared with the Commission's ruling, also in the same order, that “although the . . . word ‘ass,’ and the phrases ‘up yours,’ ‘my ass is huge,’ ‘wiping his ass,’ ‘fire her ass,[’] and ‘pissed off’ are coarse expressions, in the context presented, they are not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness.”⁷⁷ The only fig leaf proffered by the Commission was its talismanic recitation of the phrase “vulgar, graphic, and explicit,”⁷⁸ a criterion that does not begin to distinguish one euphemism from another. It is an understatement to say that these incompatible outcomes “hardly giv[e] broadcasters notice of how the Commission will apply the factors in the future.”⁷⁹

Presumptively Indecent Words. The Commission's sophistry carries over to its presumptive (but not absolute) prohibition of certain words that it sometimes (but not always) finds indecent. “Fuck” and “shit” and all their variants are always indecent, except when they

⁷⁶ *Omnibus Order*, 21 FCC Rcd at 2696-97.

⁷⁷ *Id.* at 2712.

⁷⁸ *Id.*; *see also id.* at 2684-86, 2690-91, 2693, 2699.

⁷⁹ *Fox TV Stations III*, 613 F.3d at 330.

are not.⁸⁰ The two exceptions the Commission has invented, however, are just as unpredictable in application as the presumptions they putatively qualify.

The artistic-necessity exception – in which fleeting expletives are permissible if the Commission believes them to be “demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance”⁸¹ – is in reality an artistic-*merit* standard. The Commission has ruled that the words “fuck” and “shit” used in the scripted film “Saving Private Ryan” were *not* indecent because use of the words was “[e]ssential to the ability of the filmmaker to convey to viewers the extraordinary conditions in which the soldiers conducted themselves” and were “neither gratuitous nor in any way intended or used to pander, titillate or shock.”⁸² Yet it has concluded that the same words spoken by musicians in their vernacular in the Martin Scorsese documentary “The Blues: Godfathers and Sons” *were* indecent because they were not, by the Commission’s lights, “essential” to the educational purpose of the documentary and were “shocking. . . .”⁸³ The Commission rendered this verdict even though, as then-Commissioner Adelstein pointed out in dissent to “The Blues” ruling:

It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is

⁸⁰ *Omnibus Order*, 21 FCC Rcd at 2685-86.

⁸¹ *Id.* at 2686.

⁸² *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4512-13 (2005) (“*Saving Private Ryan*”).

⁸³ *Omnibus Order*, 21 FCC Rcd at 2685.

consistent with our decisions in *Saving Private Ryan* and *Schindler's List*.⁸⁴

In the same vein, while the repeated, scripted use of the words “fuck” and “shit” was “integral” to “*Saving Private Ryan*,” a fictional movie about war, a single, a fleeting reference to the word “fucking” in a live broadcast of the Golden Globe Awards was “shocking and gratuitous.”⁸⁵

The “bona fide news” exception (which is not absolute) is no better, as the Commission’s treatment of “*The Early Show*” well illustrates. The Commission initially concluded that a woman’s unexpected use of the word “bullshitter” during a live interview on the CBS morning news program was indecent. The use of the word was “shocking and gratuitous,” the Commission initially scolded, “particularly during a morning news interview.”⁸⁶ Yet in response to a voluntary remand from the Second Circuit, the Commission said just the opposite, holding that the use of the word during the live interview was not indecent precisely *because* the offending word was used during “*a bona fide news interview*.”⁸⁷ Any standard under which the news-program context in which a word is used establishes both why the word *is* offensive, and why it *is not*, can do nothing but bewilder the parties to whom it is supposed to offer guidance.⁸⁸

⁸⁴ *Id.* at 2728. *See also Fox TV Stations III*, 613 F.3d at 333 (“We query how fleeting expletives could be more essential to the ‘realism’ of a fictional movie than to the ‘realism’ of interviews with real people about real life events”).

⁸⁵ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd 4975, 4979 (2004) (“*Golden Globe*”). *See also Fox TV Stations III*, 613 F.3d at 331 (quoting *Fox TV Stations I*, 489 F.3d at 463 (““Parental ratings and advisories were important in finding ‘*Saving Private Ryan*’ not patently offensive under contemporary community standards, but irrelevant in evaluating a rape scene in another fictional movie.”))).

⁸⁶ *Omnibus Order*, 21 FCC Rcd at 2699.

⁸⁷ *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, 13327 (2006) (“*Omnibus Remand Order*”).

⁸⁸ There are other examples in which the Commission similarly has been unable to apply its own standards consistently even to the same material within in a single case. *Compare Citadel*

Inconsistent Weighing. Even when the Commission makes up its mind in which direction particular factors cut, the weight it gives them (if any) is equally inconsistent. In the *Omnibus Order*, for example, the Commission issued a Notice of Apparent Liability (“NAL”) against an NBCUniversal-owned Telemundo station for its broadcast of “Con El Corazón En La Mano” – a 1988 Spanish-language film that included a brief sexual assault scene (in which the participants appeared fully clothed) – without even mentioning the program’s TV- MA rating; indeed, it dismissed out of hand the parental warning that preceded the disputed scene.⁸⁹ Yet in other cases the Commission has relied on such ratings and warnings to find different programs *not* indecent.⁹⁰ Similarly, the Commission did not even mention Nielsen ratings data in its NAL for “Con El Corazón” – presumably because the ratings data established that there was “no reportable viewership” of the disputed scene by children ages two to 17, a fact that would have counseled ***against*** an indecency finding.⁹¹ But when ratings data are supportive, they often figure prominently in the Commission’s analysis – as in its findings that fleeting expletives in certain other programs were “patently offensive” and thus indecent.⁹²

Indecent Images. The same arbitrary approach is on display in the Commission’s regulation of purportedly indecent images. For instance, the Commission found that a scene in

Broadcasting Co., 16 FCC Rcd 11839 (EB 2001) with *Citadel Broadcasting Co.*, 17 FCC Rcd 483 (EB 2002). Compare *The KBOO Foundation*, 16 FCC Rcd 10731(EB 2001) with *The KBOO Foundation*, 18 FCC Rcd 2472 (EB 2003).

⁸⁹ *Omnibus Order*, 21 FCC Rcd at 2675.

⁹⁰ *Saving Private Ryan*, 20 FCC Rcd at 4513 (upholding the broadcast of “Saving Private Ryan” in part because the program’s rating and warnings gave parents “ample warning” to “exercise[] their own judgment about the suitability” of the film for their children); *Omnibus Remand Order*, 21 FCC Rcd at 13305-06, 13324.

⁹¹ See *Omnibus Order*, 21 FCC Rcd at 2673-74; see also NBC Telemundo License Co., Response to Commission Inquiry, File No. EB-04-IH-0572, at 2, 4, 8 (May 15, 2005).

⁹² *Omnibus Remand Order*, 21 FCC Rcd at 13305-06, 13324.

“Schindler’s List,” depicting prisoners made to run around the camp fully naked as the sick are sorted from the healthy, was *not* indecent, given the context of a World War II concentration camp scene.⁹³ Two brief images of a woman’s naked buttocks and a portion of her breasts depicted in a scene in the critically acclaimed series “NYPD Blue,” however, *were* deemed indecent, “*notwithstanding* any artistic or social merit and the presence of a parental advisory and rating.”⁹⁴

* * * *

Even a cursory examination of the Commission’s rulings thus shows that “[t]here is little rhyme or reason” to them. As the Second Circuit aptly observed, “even the FCC cannot articulate or apply consistently” its own indecency standards.⁹⁵ As the following chart illustrates, no one can divine from these outcomes any principle guiding the agency’s enforcement or what the underlying indecency policy proscribes:

⁹³ *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

⁹⁴ *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of “NYPD Blue,”* 23 FCC Rcd at 3147, 3155 (2008) (emphasis added). It defies the imagination to suggest that the *Indecency Policy Statement* and prior Commission precedent provided sufficient clarity for broadcasters to be on notice that pixilated images of nudity would be indecent. See *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network, Program “Married By America” on April 7, 2003*, 23 FCC Rcd 3222 (2008) (“*Married By America*”).

⁹⁵ *Fox TV Stations III*, 613 F.3d at 332.

Patently Offensive Words		
<p>“Bullshit” <i>was</i> patently offensive. (“NYPD Blue”)</p>		<p>“Dick,” “dickhead,” “ass,” “up yours,” “my ass is huge,” “wiping his ass,” “fire her ass,” and “pissed off” were <i>not</i> patently offensive. (“NYPD Blue” and other programs in <i>Omnibus Order</i>)</p>
Presumptively Offensive Words		
<p>Repeated use of “fuck” and “shit” <i>was</i> indecent because not essential as an artistic matter to documentary about blues music. (“The Blues”)</p>		<p>Repeated use of “fuck” and “shit” <i>was not</i> indecent because they were essential as an artistic matter to a World War II film. (“Saving Private Ryan”)</p>
<p>“Bullshitter” <i>was</i> indecent because it was “shocking and gratuitous” in the context of a morning news interview. (“The Early Show,” before voluntary remand)</p>		<p>“Bullshitter” <i>was not</i> indecent precisely because it was used during a morning news interview. (“The Early Show,” after voluntary remand)</p>
Inconsistent Consideration of the Program’s TV Rating		
<p>Brief scene involving sexual assault was indecent, <i>irrespective</i> of the program’s TV-MA rating or special advisory. (“Con El Corazón En La Mano”)</p>	<p>Use of fleeting expletives was indecent in part because the program’s TV-PG rating would not have put parents on notice of the potential for vulgar language. (2002 and 2003 “Billboard Music Awards”)</p>	<p>Broadcast was not indecent in part <i>because</i> of program’s ratings and warnings, which gave parents “ample warning” to exercise their judgment about the suitability of the program for their children. (“Saving Private Ryan”)</p>
Inconsistent Consideration of the Program’s Nielsen Ratings Data		
<p>Brief scene involving sexual assault was indecent irrespective of Nielsen ratings data, which showed that no minors aged two to 17 viewed the program. (“Con El Corazón En La Mano”)</p>		<p>Use of fleeting expletives was patently offensive in part because Nielsen ratings data showed the program was viewed by minors aged two to 17. (2002 and 2003 “Billboard Music Awards”)</p>
Indecent Images		
<p>Two brief images of a woman’s naked buttocks <i>were</i> indecent “notwithstanding any artistic or social merit and the presence of a parental advisory and rating.” (“NYPD Blue”)</p>		<p>Scene depicting prisoners made to run around the prison camp naked was <i>not</i> indecent in the context of a World War II concentration camp scene. (“Schindler’s List”)</p>

If even the regulator cannot explain what is proscribed or why, regulated entities do not have a chance. Broadcasters have no clue what the agency will deem indecent tomorrow, and instead “are left to guess.”⁹⁶

3. The Commission’s Vague Standard and its Erratic Application Chills Protected Speech

The stakes of the uncertainty engendered by the Commission’s impenetrable policy and erratic application are sobering. The indisputable effect of that approach is to chill broadcasters’ protected speech. That effect is magnified by the steep fines the Commission may impose, which have been increased tenfold.⁹⁷

Inevitably, broadcasters have been exercising severe self-censorship; in the current environment, even a large corporation cannot willingly subject itself to the threat of enforcement action “for an error in judgment as to what is indecent.”⁹⁸ For example, when CBS announced in 2006 that it would re-broadcast its Peabody Award-winning “9/11” documentary on the fifth anniversary of the September 11 attacks without editing expletives actually spoken in real time by the participants in those tragic events, CBS affiliates serving roughly 10 percent of U.S. households decided they would either not broadcast the program at all or would delay its start until after 10 p.m., during the safe harbor, despite having previously broadcast the same documentary twice.⁹⁹ The Commission’s capricious approach also had a similarly chilling effect

⁹⁶ *Id.*

⁹⁷ See Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235 § 2(b)(2)(C)(ii), 120 Stat. 491, 491 (2006), codified at 47 U.S.C. § 503(b)(2)(C)(ii).

⁹⁸ *ACLU v. Reno*, 929 F. Supp. 824, 856 (E.D. Pa. 1996), *aff’d Reno*, 521 U.S. 844 (1997).

⁹⁹ See *Profanity Concerns Prompt CBS to Show ‘9/11’ on Web*, Asian Fanatics (Sept. 9, 2006), <http://asianfanatics.net/forum/topic/301839-profanity-concerns-prompt-cbs-to-show-911-on-web/>; John Eggerton, *Pappas Won’t Air CBS’ 9-11 Doc*, BROADCASTING & CABLE (Sept. 7, 2006, 12:17 PM) <http://www.broadcastingcable.com/article/105685->

on ABC affiliates when the ABC Television Network decided to re-air “Saving Private Ryan” in 2004: Although the Commission staff had ruled twice before that the film was *not* indecent, nearly 70 ABC-affiliated television stations nonetheless declined to air the film again, understandably unwilling to trust the agency’s past rulings as any indication of its future position. “Without an advance waiver from the FCC,” said Ray Cole, president of Citadel Broadcasting, “we’re not going to present the movie in prime time.”¹⁰⁰

Examples like these abound. And they illustrate the evil that the Supreme Court’s precedents condemn: “[T]he absence of reliable guidance in the FCC’s standards chills a vast amount of protected speech,”¹⁰¹ leading broadcasters to “steer far wider of the unlawful zone” and forgo speech that the First Amendment protects.¹⁰²

Pappas_Won_t_Air_CBS_9_11_Doc.php (describing affiliate’s decision to preempt the 9/11 documentary because affiliate believed that, “in the current regulatory climate, stations that air network programming with indecent or profane content are subject to significant fines and the threat of license revocation”) (internal quotations omitted); John Eggerton, *Sinclair to Delay 9/11 Doc*, BROADCASTING & CABLE (Sept. 1, 2006, 3:04 PM) http://www.broadcastingcable.com/article/98436-Sinclair_To_Delay_9_11_Doc.php (describing Sinclair Broadcasting’s belief that “the current rules, which promote censorship and impose excessive fines, coupled with the lack of clear or advance guidance from the FCC, impede broadcasters from airing programs that honor our heroes and memorialize significant events”) (internal quotations omitted).

¹⁰⁰ Lisa de Moraes, “*Saving Private Ryan*”: A New Casualty of the Indecency War, Wash Post, Nov. 11, 2004, at C01. After the broadcast, the Commission dismissed indecency complaints brought against ABC, ruling that “*Saving Private Ryan*” did not violate the indecency rules despite the fact that it contained numerous and repeated expletives. But that ruling came too late to prevent preemption of the film by ABC-affiliated television stations across the country. *Saving Private Ryan*, 20 FCC Rcd at 4508-09.

¹⁰¹ *Fox TV Stations III*, 613 F.3d at 335.

¹⁰² *Fox TV Stations I*, 489 F.3d at 463 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). For additional examples of chilled speech, see *Fox TV Stations III*, 613 F.3d at 334-335.

C. The Commission’s Enforcement Procedures Compound the Constitutional Defects

The harms caused by the Commission’s indecency standard are exacerbated further by the process the agency employs to enforce it. The lack of any meaningful restrictions on who may bring complaints or what they must show to trigger burdensome investigations impermissibly enables an agitated minority to silence speech desired by the majority. And the glacial pace of proceedings multiplies the burdens broadcasters face many times over.

1. The Commission’s Broadcast Indecency Enforcement Regime Grants a Vocal Minority a “Heckler’s Veto”

The Commission’s indecency enforcement process effectively confers “broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech.”¹⁰³ Decades of Supreme Court precedent make clear that “the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker.”¹⁰⁴

The Commission’s complaint process offers would-be hecklers just such a forbidden veto. Because the process lacks any form of evidentiary rigor, it allows private advocacy groups to exercise significant influence over indecency enforcement. The Commission accepts identically worded form letters or computer-generated complaints – treating each one as an independent, individual grievance – even though they do not provide the Commission with either

¹⁰³ See *Reno*, 521 U.S. at 880. See also *Hill v. Colorado*, 530 U.S. 703, 734 n.43 (2000) (“governmental grants of power to power to private actors [are] constitutionally problematic” when “the regulations allow[] a single, private actor to unilaterally silence a speaker even as to willing listeners”).

¹⁰⁴ *Feiner v. New York*, 340 U.S. 315, 320 (1951). See also *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Miller v. California*, 413 U.S. 15, 33 (1973) (Speech “will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person-or indeed a totally insensitive one.”); *Ashcroft*, 542 U.S. at 674 (Stevens, J., concurring) (“the Government may not penalize speakers for making available to the general . . . audience that which the least tolerant communities in America deem unfit for their children’s consumption”).

reliable evidence upon which to determine whether a given broadcast was actionably indecent or significant insight into community standards.¹⁰⁵ The Commission’s policy of permitting such “cookie-cutter” complaints enables advocacy groups to shape the enforcement process by mobilizing armies of individuals to file complaints.

The Commission uncritically accepts these pro forma filings without requiring the complainants to satisfy the most elementary evidentiary or pleading thresholds. According to the agency’s website, the Commission’s staff reviews each complaint to determine whether it “alleges information sufficient to *suggest* that a violation” of the indecency prohibition may have occurred.¹⁰⁶ But the Commission’s rules do not require that a complainant even plead a prima facie case, which might greatly reduce the opportunity for abuse.¹⁰⁷ No rule requires that the filer allege that he or she (1) watched the program at issue, (2) watched the program on *broadcast* television, or (3) watched it outside the 10 p.m. safe harbor.¹⁰⁸ Complainants also need not document the allegedly offensive broadcast through a recording or transcript of the broadcast.¹⁰⁹ Nor are they required to explain why they believe the broadcast to be indecent – or

¹⁰⁵ See Adam Thierer, The Progress & Freedom Foundation, Progress on Point Release 12.22, *Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process*, at 5 (Nov. 2005), available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>.

¹⁰⁶ See FCC, FCC Encyclopedia, Obscenity, Indecency, Profanity – Complaint Process, <http://www.fcc.gov/encyclopedia/obscenity-indecency-profanity-complaint-process> (“FCC Indecency Complaint Process Web Page”) (emphasis added) (last visited June 17, 2013).

¹⁰⁷ *Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985) (“FCC policy of requiring a substantial prima facie case before proceeding against a broadcaster . . . reflects an appropriate respect for First Amendment values.”).

¹⁰⁸ The Commission had previously indicated that complaints “must generally include” the “date and time of the broadcast,” *Indecency Policy Statement*, 16 FCC Rcd at 8015, but it is not clear that it continues to follow that process regularly.

¹⁰⁹ The Commission had previously indicated that complaints “must generally include” a “full or partial tape or transcript or significant excerpts of the program,” *id.*, but it no longer

even to allege that a child viewed the broadcast, even though preventing harm to children is the primary purported constitutional justification for the Commission's entire indecency-enforcement enterprise.¹¹⁰ The Commission also imposes no time limit on when a complaint can be filed, allowing complaints to be filed long after a complainant can reasonably be expected to remember accurately what it is he or she is complaining about.

This is not an enforcement process designed to safeguard First Amendment values. To the contrary, it reflects a complete abandonment of the policy of restraint on which the courts have relied in upholding the Commission's authority to regulate broadcast indecency.

2. The First Amendment Problems Are Exacerbated by the Commission's Glacial Pace in Resolving Broadcast Indecency Cases

The lack of any meaningful standards restricting the initiation of enforcement actions is compounded by the Commission's approach to conducting the proceedings once commenced. The Commission routinely fails to act on indecency complaints in a timely manner and fails to apprise broadcasters when complaints have been dismissed without enforcement action. The Commission's Indecency Complaint Process Web Page indicates that the Commission "reviews each complaint" received and either will initiate an investigation or "send the complainant a dismissal letter explaining the deficiencies in the complaint and how to have it reinstated."¹¹¹ To be sure, a licensee may reasonably infer from the fact that the Enforcement Bureau issues a Letter of Inquiry ("LOI") regarding a broadcast that the Bureau believes the material at issue

appears to follow that practice regularly. In that regard, the FCC Indecency Complaint Process Web Page indicates that the Commission "may ask the station to confirm or deny the allegations in the complaint and provide copies of any tapes or transcripts of the program at issue," thus impermissibly shifting the evidentiary burden to the station.

¹¹⁰ See *infra* note 135.

¹¹¹ See FCC Indecency Complaint Process Web Page, *supra* note 106.

might be indecent, and may conduct its business accordingly. But there is often a long delay between issuance of an LOI and a determination of whether further action may be warranted.¹¹² And in the interim – which may be years – the affected broadcaster has no clue what the Commission ultimately will do. The broadcaster often will not know with certainty when it can stop holding its breath: Even in cases in which it does not proceed to an NAL, the Commission, more often than not, will fail to inform the subject broadcaster that the investigation has been terminated.¹¹³

An indecency investigation thus can hang over a broadcaster's head almost indefinitely. Coupled with the steep fines that may accompany a finding that the broadcaster aired indecent material, this inevitably causes broadcasters to be more cautious, thereby further chilling constitutionally protected speech. As the Government Accountability Office ("GAO") recently noted in connection with the analogous subject of a Commission investigation of sponsorship identification issues, as a result of:

[t]his practice of not informing broadcasters about the results of investigations . . . broadcasters might not have sufficient information to determine whether they should modify their practices. This could result in stations unnecessarily editing content because of unwritten regulatory policy or what they assume the policy to be.¹¹⁴

¹¹² Of the six most recent indecency NALs for which the LOI date is available, the average length of time between an LOI and an NAL was 17.2 months; the longest was 27 months and the shortest was 11 months. *See generally Omnibus Order*, 21 FCC Rcd 2664. A seventh NAL released the same day as these six does not include an LOI date. *See Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* 21 FCC Rcd 2732 (2006).

¹¹³ NBCU is the subject of several LOIs (some dating as far back as 2004) in cases that, to the best of its knowledge, have not been resolved.

¹¹⁴ Government Accountability Office, *Broadcast and Cable Television, Requirements for Identifying Sponsored Programming Should be Clarified*, at 24 (Jan. 2013), available at <http://www.gao.gov/assets/660/651744.pdf>. The GAO recommended that "to provide guidance

The Commission acts as its own enabler in this speech-chilling process by manipulating the statute of limitations for an NAL far beyond congressional intent. For all services other than broadcasting, the Commission is required to issue an NAL within one year of the alleged violation.¹¹⁵ For broadcasters, the Commission interprets a special broadcaster renewal-based prong of the statute of limitations as permitting it to issue an NAL any time within the same license term as the alleged violation occurred.¹¹⁶ The Commission, however, routinely fails to grant broadcast license renewals for years and years so that if it decides to issue an NAL in response to a particular indecency complaint, it will be within the same continuing license term and thus, in the Commission's view, within the statute of limitations.¹¹⁷ NBC or Telemundo owned stations have 11 renewal applications pending from the renewal cycle that began in 2004. NBCU believes inaction on these renewal applications is due to pending indecency complaints. In the meantime, a new television renewal cycle commenced in 2012, and several of these stations now have two renewal applications pending before the Commission.

on allowable activities, FCC should communicate the closure of all sponsorship identification investigations with the broadcaster named in the complaint after a letter of inquiry was sent." *Id.* at 31.

¹¹⁵ 47 U.S.C. § 503(b)(6)(B).

¹¹⁶ *See id.* § 503(b)(6)(A)(ii).

¹¹⁷ The length of time prior to an NAL is in and of itself constitutionally suspect. As Judge Tatel stated, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn," and "the Supreme Court requires the use of 'sensitive tools,' including prompt judicial review, to draw that line." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1264 (D.C. Cir. 1995) ("ACT IV") (Tatel, J., dissenting) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 70 (1963) (internal quotation marks and citations omitted)). Judge Tatel went on to emphasize that the Commission might "implement its indecency forfeitures under section 503(b)(4) in a constitutional manner by allowing 'judicial review [to] begin almost immediately.' But it does not. . . . [T]he Commission's actual implementation of the statute is characterized by years of delay and a total lack of judicial review." *Id.* (citations omitted).

This practice is flatly inconsistent with the First Amendment. It is also contrary to congressional intent. Congress designed the renewal-based statute of limitations prong for broadcasters to deal with “violations of FCC rules [that] are discovered at the time of broadcast license renewal,” not to allow the Commission to wait years to act on a complaint.¹¹⁸ The Commission’s approach defeats the fundamental purpose of a statute of limitations: to “serve a policy of repose” such that “‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’”¹¹⁹

The chilling effect is magnified by the fact that, even after it issues an NAL, the Commission often waits *years* before ruling on the broadcaster’s response, yet it treats the NAL as precedent in the interim. In 1995, the D.C. Circuit upheld the Commission’s indecency complaint process in part because the Commission then had an internal guideline calling for it to rule on NAL responses within 60 days, even though in practice it took on average approximately nine months.¹²⁰ The court estimated that the “whole course” from “issuing a NAL, imposing a forfeiture, and if need be referring a case to the Department of Justice . . . could probably be run in most cases within, say, 90 days,” which would have the beneficial effects of “cabin[ing] the Commission’s opportunity to rely upon its own unreviewed forfeiture decisions in setting standards of decency, thereby reducing the tendency for one unconstitutional decision to beget

¹¹⁸ See S. Rep. No. 95-580 at 7 (1977).

¹¹⁹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007). See also S. Rep. No. 86-1857, at 10 (1960) (purpose of section 503(b) statute of limitations is to “bar the imposition of a forfeiture on a ‘stale’ violation. . .”).

¹²⁰ *ACT IV*, 59 F.3d at 1254.

others.”¹²¹ But instead of streamlining and expediting its process, the Commission has drawn it out even longer, frequently waiting years after issuing an NAL to rule.¹²²

III. THE COMMISSION SHOULD INITIATE A RULEMAKING TO RECONSIDER THE BASIS AND SCOPE OF ITS AUTHORITY TO IMPOSE A BROADCAST-SPECIFIC INDECENCY REGIME

A. A Rulemaking Is Needed To Enable the Commission To Reconsider Broadcast Indecency Enforcement

As the foregoing demonstrates, there is at minimum grave doubt whether the Commission today can adopt or enforce *any* broadcast indecency regime that will satisfy constitutional requirements. *Pacifica* no longer has any vitality in light of marketplace and technological changes. And more recent rulings call into question the constitutionality of the Commission’s entire indecency enterprise and establishes that the template the agency has used for years is void for vagueness. Before it may adopt any indecency policy going forward, the Commission must grapple with these constitutional defects in its standard and its enforcement protocol. If it concludes that it has any authority to police broadcast indecency, the Commission must carry its burden of demonstrating that its regime is constitutional, and it must ensure that the process by which it enforces any new standard also complies with the Constitution.

The Commission cannot properly undertake these tasks without notice and comment rulemaking. Admittedly, the Commission has some discretion to develop its standards, policies, and interpretations through either rulemaking or *ad hoc* adjudication.¹²³ But *ad hoc* adjudication

¹²¹ *Id.* at 1259-60.

¹²² See, e.g., *Married By America*, 23 FCC Rcd 3222 (Forfeiture Order released 40 months after NAL); *Emmis Radio License Corp.*, 17 FCC Rcd 21697 (EB 2002) (Forfeiture Order released 22 months after NAL); *The KBOO Foundation*, 18 FCC Rcd 2472 (EB 2003) (NAL rescinded 21 months after NAL).

¹²³ *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

is decidedly inadequate and inappropriate here. The Supreme Court has made clear that rulemaking procedures are preferred where an agency is developing prospective rules,¹²⁴ while adjudication should be used to establish the law retroactively on a case-by-case basis when an issue has not been previously addressed.¹²⁵ And the Court has warned that it would be improper for an agency to develop policy through adjudication when, for instance, significant “fines or damages” may ride on the result of the adjudication.¹²⁶ Courts of appeals have accordingly taken agencies to task for using adjudication to “circumven[t] . . . rulemaking procedure,”¹²⁷ and in some circumstances have held that “an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application.”¹²⁸

The inappropriateness of proceeding by case-by-case adjudication is especially apparent here; indeed, the Commission’s track record of unpredictable, *ad hoc* rulings is part of the problem. Broadcasters and the public deserve constitutionally sustainable standards that provide both certainty and fair notice in advance of what is permitted and what is not. Notifying speakers after the fact of what speech is proscribed, one case at a time, is demonstrably unsuited to this task.

¹²⁴ *Id.* at 202 (“The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”).

¹²⁵ *Id.*

¹²⁶ *NLRB v. Bell Aerospace*, 416 U.S. 267, 294-95 (1974).

¹²⁷ *Patel v. INS*, 638 F.2d 1199, 1205 (9th Cir. 1980); *see also First Bancorporation v. Board of Governors*, 728 F.2d 434, 438 (10th Cir. 1984); *Ruanswang v. INS*, 591 F.2d 39, 44 (9th Cir. 1978).

¹²⁸ *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981).

The Commission also should suspend enforcement of its current indecency policy pending the outcome of the rulemaking.¹²⁹ As shown above, the Commission cannot continue to enforce its current policy consistently with the First Amendment. A suspension would prudently avoid unnecessary and judicially unsustainable intrusion into constitutional values.

B. Any New Indecency Regime Must at Minimum Address the Most Glaring Constitutional Infirmities of the Commission's Existing Approach

Given the constitutional defects in its indecency enforcement regime, the Commission faces a daunting (indeed, likely impossible) task of crafting new policies and procedures that can withstand First Amendment review. But to the extent the agency believes that it may continue broadcast indecency enforcement, it must at least fashion an enforcement approach that avoids the worst excesses of its current unconstitutional approach. While it is far from clear that any new regime could pass constitutional muster, it is certain that no new protocol will survive if it fails to address these basic issues. The following minimum requirements are not exhaustive, but reflect only the most essential attributes that the Commission must address in formulating any proposal it promulgates for comment.

1. Substance

At the very least, the Commission should modify the substance of its indecency enforcement regime as follows:

¹²⁹ See, e.g., *Suspension of Section 73.682(a)(21)(iv) of the Commission's Rules to Permit Additional Use of Line 19 of the TV Vertical Blanking Interval*, 7 FCC Rcd 7158 (1992) (suspending rule reserving vertical blanking interval for a particular purpose in anticipation of a future rulemaking to eliminate or modify that requirement); *Television Waveform Standards*, 100 F.C.C.2d 1569 (1985) (describing five-year suspension of maximum vertical and horizontal blanking interval standards prior to adoption of rules).

Exempt News, Public Affairs, and Live Sports From Indecency Enforcement. The Commission should exempt news, public affairs programming, and live sports from any indecency enforcement because the risks of unnecessarily treading on broadcasters' free speech rights in those contexts are too great.¹³⁰ All news and public affairs programming, live or taped, should be exempt because any expletives, due to the nature of the programming, would likely be fleeting, unanticipated, or unintentional and because the subject matter is news and should be treated with particular sensitivity. Live sports should also be exempt, again because expletives, due to the nature of the programming, would likely be fleeting, unanticipated, or unintentional.

Abandon Enforcement Regarding Expletives Beyond Prior Policy. The Commission should disavow its recent expansion on its policy regarding expletives, and forswear enforcement that goes beyond what its prior approach to expletives permitted. Specifically, to the extent expletives alone are the basis for an indecency analysis, the Commission should hold that expletives cannot be found to be indecent in cases that do not involve the "deliberate and repetitive use" of expletives "in a patently offensive manner."¹³¹

Return to Prior Policy Regarding Profanity. The Commission should explicitly reaffirm its prior policy that the statutory term "profanity" means blasphemy, which can no longer be

¹³⁰ See "*Petition for Clarification or Reconsideration*" of a Citizen's Complaint against *Pacifica Foundation*, 59 F.C.C.2d 892, 893 n.1 (1976) (it would "be inequitable for us to hold a licensee responsible for indecent language" in the context of "public events" that "are covered live, and there is no opportunity for journalistic editing"). See also *Peter Branton*, 6 FCC Rcd 610 (1991) (in finding repeated use of "fucking" in a news segment not indecent, the Commission notes that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners.").

¹³¹ *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987). Accord, *The Regents of the University of California*, 2 FCC Rcd 2703 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word.").

regulated under separate freedom of religion grounds.¹³² The older approach changed in 2003 with the Commission's *Golden Globe* ruling that the word "fucking" was profane.¹³³ The Commission should abandon this ill-advised expansion of profanity to include certain expletives.

Tailor Safe Harbor Hours To The Realities of Primetime Schedules In Different Time Zones. For decades, broadcast networks have routinely established their primetime evening periods in the Central and Mountain Time zones as the hours between 7 p.m. to 10 p.m., in contrast to the customary 8 p.m. to 11 p.m. period in the Eastern and Pacific Time zones. A safe-harbor period that does not start until after primetime ends in large swaths of the country – including the metropolises of Chicago, Dallas, Houston, Minneapolis/St. Paul, St. Louis and Kansas City – potentially deprives millions of adult Americans of programming suitable for the willing viewers among them. The Commission therefore should consider a program broadcast after 10 p.m. in the Eastern Time zone to be within the safe harbor even in the Central and Mountain Time zones where it may be broadcast after 9 p.m.

2. Process

Any new enforcement regime must afford broadcasters due process, and the Commission must strictly adhere to a set of clear procedural requirements. In particular, it should:

Consider Only Bona Fide Complaints. The Commission should adopt rules to consider only *bona fide* complaints. Specifically, complaints should be required to provide certain basic

¹³² See, e.g., *Raycom America, Inc.*, 18 FCC Rcd 4186, 4187 (2003) (citing *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952) ("It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine.")). Compare *Omnibus Order* and *Golden Globe*.

¹³³ *Golden Globe*, 19 FCC Rcd at 4981-82. See also *Omnibus Order* ("fuck" and "shit" both profane).

information sufficient to demonstrate that the complainant actually saw and was troubled by the potentially offensive material, i.e., a complainant should be required to certify that he or she:

- viewed the programming at issue on the date and at the time stated in the complaint;
- received the programming via the station's over-the-air signal, and not through a subscription MVPD service, such as cable or satellite TV, or via the Internet or other online service;¹³⁴
- viewed the programming in the company of a minor child;¹³⁵ and
- viewed the programming at a time outside the safe-harbor hours of 10 p.m. to 6 a.m. (with appropriate adjustments, as suggested above, for the Central and Mountain time zones).

In addition, a complainant also should be required to provide an explanation regarding why he or she believes the broadcast to be indecent, provide a video recording (or at least a detailed written description) of the broadcast material sufficient to demonstrate that further investigation by the Commission may be warranted, and file the complaint within 30 days after the allegedly indecent material was broadcast. Complaints that fail to provide this basic information should be promptly dismissed with prejudice.

¹³⁴ A consumer who has chosen to subscribe to a multichannel video service or to access video through the Internet or any online means should be deemed to have consented to the availability of broadcast video content, just as he or she has done with respect to the other content delivered via that platform. *See, e.g., Various Complaints Against the Cable/Satellite Television Program "Nip/Tuck,"* 20 FCC Rcd 4255, 4255-56 (EB 2005) (summarizing extant law that the Commission does not regulate cable or satellite indecency). *See also, e.g., Playboy*, 529 U.S. 803 (striking down cable indecency restraint under strict scrutiny review); *Reno*, 521 U.S. 844 (striking down Internet indecency restraint under strict scrutiny review).

¹³⁵ Both the courts and the Commission have repeatedly stressed that the ultimate goal of the broadcast indecency restrictions is to protect *children* from harm, regardless of whether the objective is cast as supporting parents' interests in shielding their offspring or as a broader societal interest in safeguarding youngsters. *See, e.g., Enforcement of Prohibitions Against Broadcast Indecency*, 5 FCC Rcd 5297, 5300 (1990); *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc) ("*ACT III*"). The broadcast indecency rules cannot be used to shield sensitive adults from content they may personally dislike.

This process, if adequately explained and scrupulously enforced – and assuming that any enforcement could be justified (which is highly doubtful) – might provide for a more rigorous enforcement process that would better focus the Commission’s enforcement efforts and better enable the agency to take enforcement actions within the confines of the First Amendment. A more rigorous process could also help the Commission to marshal more effectively its own limited enforcement resources and avoid the significant delays and disruptions associated with its current complaint procedures.

Focus On Trends Or Patterns Instead Of Each Individual Complaint. The Commission should announce that it will not address every indecency complaint. Rather, the Commission should focus on trends or patterns of alleged deficiencies that reflect recurring and serious problems, an approach the agency already employs with respect to enforcing other regulations.¹³⁶ The Commission is empowered to exercise its discretion by proceeding only in cases that most warrant enforcement action. Prudent avoidance of borderline scenarios would be consistent with the cautious approach to indecency enforcement cited with approval in *Pacifica* and *ACT I*.¹³⁷

Establish Enforceable Deadlines By Rule. The Commission should codify specific deadlines by which it will either take action on indecency complaints or after which the

¹³⁶ See, e.g., *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, 26 FCC Rcd 17222, 17238 (2011) (“We intend to initiate an investigation when we receive a pattern or trend of consumer complaints indicating possible noncompliance.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14139 (2003) (“The Enforcement Bureau has in place effective procedures to review aggregate complaint information to determine the general areas that merit enforcement actions, and to identify both particular violators and the individual consumers who may be able to assist the staff in pursuing enforcement actions against such violators.”).

¹³⁷ *Pacifica*, 438 U.S. at 761 (Powell, J., concurring); *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (“*ACT I*”).

complaint will be deemed to be denied or dismissed. Doing so should help it avoid exacerbating the constitutional weaknesses of its current procedural handling of pending complaints and forfeiture proceedings. Accordingly, the rules should provide that all indecency complaints (including those the agency chooses not to address) should be deemed denied or dismissed unless the Commission either issues an NAL or takes other substantive action on them within one year. This approach would conform to the standard statute of limitations for non-broadcast NALs. It also likely would eliminate the problem of broadcast license renewals being routinely delayed for years because of pending indecency complaints. Similarly, all indecency NALs should be deemed cancelled six months after their issuance if the Commission fails to issue a forfeiture order or take other substantive action within that period.

Clarify the non-precedential value of NALs. The Commission should clarify expressly that indecency NALs are not legal precedent and that parties and the Commission may not rely on indecency NALs as legal precedent or consider the existence of NALs with regard to license renewals unless and until the NAL has been affirmed by a final forfeiture order.

* * * *

These proposals do not address the core questions of whether, how, and under what authority the Commission can continue to provide broadcasters with lower levels of First Amendment protections than those guaranteed all other forms of media. The Commission must grapple with these questions, and it is far from clear that the Commission today can adopt or enforce any broadcast-specific indecency regime that will survive constitutional scrutiny. But these proposals would help alleviate some of the most egregious of the constitutional infirmities plaguing the Commission's existing broadcast indecency regime.

IV. CONCLUSION

The Commission's existing broadcast indecency enforcement policies and procedures are rife with constitutional infirmities and must be revisited. The Commission should initiate a rulemaking proceeding to consider whether and how it can develop a constitutionally sustainable indecency enforcement regime.

Respectfully submitted,

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